No. 89-1001

In The

Supreme Court of the United States

October Term, 1989

SWIN RESOURCE SYSTEMS, INC.,

Petitioner,

vs.

LYCOMING COUNTY, PENNSYLVANIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Can a County which operates a landfill that it has constructed do so as free of the restraints of the dormant power of the Commerce Clause as any private landfill operator?

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STATEMENT OF THE CASE

Statement of Facts

Swin is a Pennsylvania corporation, which operates a municipal solid waste processing facility in Columbia County. Swin receives municipal solid waste from eastern Pennsylvania and New Jersey, separates certain portions of that solid waste for recycling, and compacts the remainder into bales. Swin then causes these bales to be transported to landfills for disposal.

Lycoming County is a political subdivision of the Commonwealth of Pennsylvania, which controls and operates a landfill (the "landfill") through the Lycoming County Solid Waste Department. The individual respondents are the three commissioners of Lycoming County who held office when suit was brought and Wayne Alexander, the manager of the landfill.

Lycoming County constructed the landfill in 1974 on land owned by the United States Bureau of Prisons in Lycoming County. The landfill is operated as a consequence of a permit granted to Lycoming County by the Bureau of Prisons. The permit runs for 30 years.

In March, 1986, Lycoming County advised Swin by letter that it would "accept baled waste" from the Swin recycling plant which was then proposed "at a price range of $10.00 per ton." The letter specifically provided that the price range quoted was "for waste from the 5-1/2 county service area only. . . ."

Swin did not begin disposing of its solid waste at the landfill until November, 1986, more than eight months later. Swin originally was billed by and paid to Lycoming

County the disposal rates then applicable to waste within the 5-1/2 county local area. As of January, 1987, the landfill charged $10.00 per ton for disposal of waste generated within Lycoming County; $13.25 for waste generated within the surrounding counties of Union, Snyder, Northumberland, Montour, and Columbia; and $17.20 for waste which was generated outside this local area.

On September 14, 1987, Lycoming County increased its rates at the landfill for solid waste generated outside the local area from $17.20 per ton to $30.00 per ton. Lycoming County's intent was to extend the life of the landfill for use by its citizens; it believed that increasing the rate would discourage landfill use by those delivering waste generated outside the local area.

Because the waste Swin handles is from outside the local area, Swin was notified that its charges for disposal at the landfill would be $30.00 per ton. The landfill also imposed a 100 tons-per-day restriction on the volume of waste Swin could deposit. Thereafter, Swin stopped disposing of any waste at the landfill.

Procedural History

By its complaint, Swin sought relief in 4 counts against the respondents. The complaint alleged claims arising under the Commerce Clause of the United States Constitution, under due process and equal protection rights, under a breach of contract, and under a federal land use statute, 43 U.S.C. §931(c).

As the complaint alleged, Lycoming County operates its own landfill. In the course of doing so, it sets rates for

trash disposal and imposes volume restrictions. Swin's complaint challenged, *inter alia*, the landfill's price and volume restriction system, contending that the limitations as applied to Swin, because it disposed of non-local garbage, were discriminatory and in violation of the dormant power of the Commerce Clause.

Lycoming County argued that it was a participant in the landfill market and that, as a consequence, it was free of the restraints of the dormant Commerce Clause, in much the same way as any private operator in the landfill market. Lycoming County noted that it established prices and volume restrictions only for its own landfill. These prices and volume restrictions have no impact on the operation of any other landfill, private or public.

The respondents filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Swin chose to rest on the allegations of its complaint with respect to the motion to dismiss. The district court granted the motion, without prejudice to Swin's right to pursue its breach of contract claim in state court.* The district court also denied Swin's later motion to alter or amend the judgment.

Swin then appealed to the United States Court of Appeals for the Third Circuit. Argument on the appeal was heard by a three-judge panel of that court, which

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* Swin has never pursued further its state law contract claim. It has never secured any ruling that it has a contract right to dispose of trash in the landfill at any particular price or in any particular quantity.

affirmed the district court on August 25, 1989. Chief Judge Gibbons filed a dissenting opinion. The majority concluded without substantial difficulty that Lycoming County, in the context of the rules it had established for operating its own landfill, fit within the market participant doctrine that this Court had articulated. The majority also dismissed Swin's claim that land used for a landfill is a scarce natural resource, and it held that, because Lycoming County had expended time and effort to develop the landfill, its control of that facility was not a matter of mere happenstance.

On September 8, 1989, Swin filed a petition for rehearing *en banc*. The full court rejected this petition on September 25, 1989, with only two judges of the Third Circuit agreeing with Swin that rehearing was appropriate.

REASONS FOR DENYING THE WRIT

I. The Third Circuit's Conclusion That The County Was A Market Participant And Thus Exempt From The Dormant Commerce Clause Is Consistent With The Decisions Of This Court.

Throughout its petition, Swin makes repeated reference to the idea that landfills are scarce natural resources. Suggesting this as the primary question below, Swin states in its lead argument that this question was answered in a way that was inconsistent with the decisions of this Court. In actuality, the primary question answered by the Third Circuit was whether Lycoming County's running of its landfill and its creation of operating rules for that landfill made it a participant in the landfill market, exempt from dormant Commerce Clause restraints.

In answering this question affirmatively, the Third Circuit acted consistently with this Court's decisions, including its three opinions outlining and applying the market participant doctrine. Hence, in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), this Court upheld a statutory scheme whereby the State of Maryland participated in the purchasing of scrap vehicles and rejected the contention by out-of-state processors of junk automobiles that it violated the Commerce Clause. After reviewing the history of the Commerce Clause, this Court concluded:

> We do not believe the Commerce Clause was intended to require independent justification for such action. Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment. . . . *Nothing in the purposes animating the Commerce Clause prohibits a*

> *State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.*

Id. at 809-810 (footnotes omitted and emphasis supplied).

The Court's next application of the market participant doctrine occurred in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *Reeves*, the Court upheld a South Dakota policy confining the sale of cement by a state-operated cement plant to residents of that state in order to meet their demand during a serious cement shortage. This Court underscored the "basic distinction drawn in *Alexandria Scrap* between states as market participants and states as market regulators[,]" and it iterated that the distinction made "good sense and sound law." *Id.* at 436. In so holding, the Court felt that there was no constitutional design to limit the ability of states to operate without restriction in the free market. When acting as proprietors, the Court concluded that states should share freedoms from federal restraints equally with private market participants.

In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), the Court held that the City of Boston was acting as a market participant, in the context of an executive order that required all construction projects funded by City money to be performed by work forces composed at least 50% of Boston residents. In reapplying the principles articulated in *Alexandria Scrap* and *Reeves*, the Court stated:

> *Alexandria Scrap* and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce

> Clause. As we said in *Reeves*, in this kind of case there is "a single inquiry: whether the challenged 'program constituted direct state participation in the market.' " 447 U.S. at 436, n. 7, 100 S.Ct. at 227, n. 7. We reaffirm that principle now.

Id. at 208.

In applying these precedents to the present case, the Third Circuit "readily" and correctly concluded that Lycoming County's operation of its landfill made it a market participant, free of the restrictions of the inherent power of the Commerce Clause. *Swin Resource Systems, Inc. v. Lycoming County, Pennsylvania*, 883 F.2d 245, 250 (3d Cir. 1989). As the Third Circuit stated, Lycoming County is a participant in the market for disposal services, and the discrimination of which Swin complained exists only in the rules concerning the price and volume conditions under which persons using the Lycoming County facility must operate. Lycoming County does not purport to impose its price and volume conditions upon any private landfill or any public landfill other than its own.

In reaching its conclusion that Lycoming County was a market participant, the Third Circuit was careful to consider this Court's opinion in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). The Third Circuit characterized *Wunnicke* as the principle case in which this Court's application of the market participant doctrine resulted in a conclusion that a state was not a market participant. In distinguishing *Wunnicke* from the present case, the Third Circuit observed that, unlike the attempt by Alaska in *Wunnicke* to regulate the downstream handling of lumber, the conditions on the garbage

dumped in Lycoming County's own landfill did not, by their terms, regulate any activity beyond the market transactions in which Lycoming County itself was engaged.

Contrary to Swin's assertions, the market participant doctrine is alive and well. As the Third Circuit held, Lycoming County is such a market participant consistent with the decisions of this Court.

II. The Third Circuit's Rejection Of Swin's Contention That Landfills Are Scarce Natural Resources Is Consistent With The Decisions Of This Court.

The Third Circuit issued one caveat to its ready conclusion that Lycoming County was a market participant. That caveat was evidenced in its consideration of the possibility that a "natural resource" exception to the market participant rule might apply. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court invalidated a statewide legislative scheme that was intended to bar out-of-state trash from New Jersey disposal sites, but it expressly reserved the question of whether a state, consistent with the Commerce Clause, could restrict to state residents access to state-owned resources such as landfills. *Philadelphia, id.* at 629 n.6.

The Third Circuit recognized the suggestion in some of the post-*Philadelphia* statements of this Court applying the market participant doctrine that, where scarce natural resources are involved, the doctrine may not apply in the same way. *See, e.g., Reeves*, 447 U.S. at 443-444. This Court, however, has never stated that landfills are scarce natural

resources. Moreover, the Third Circuit concluded that the landfill in question was not a scarce resource, because it was not simply the product of "happenstance" and geological fortuity that has caused this Court possible concern, *see, e.g., Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982), but the result of hard work and the initiative of Lycoming County.

Equally invalid is Swin's argument that, if a scarce natural resource is involved, the market participant doctrine does not apply at all. Indeed, *Wunnicke* stands in opposition to this contention, since the basis for the plurality opinion in *Wunnicke* was not that a scarce natural resource, i.e., timber, was involved, but rather that there was an attempt by the would-be market participant to control activity outside the market in which it directly participated.

The Third Circuit stated that the present case was neither one in which a state had hoarded a geologically-peculiar resource such as coal or oil, nor one in which a state had used its ownership of land as a means of discriminating against the transportation of goods in interstate commerce. Accordingly, the Third Circuit correctly concluded that no scarce resource exception should apply in this case.

III. There Is No Compelling Question Of National Dimension Raised By The Facts Of This Case.

Failing in its ability to demonstrate that the Third Circuit acted inconsistently with the decisions of this Court, Swin would propose that review should be

granted because of the urgency of the question presented here and its purported national dimension. While Swin cites the "specter of state and local governments acquiring landfill sites and withdrawing from the national market," Petition for Writ of Certiorari at 18, the reality is that no opinions have issued from this Court in the eleven years since *Philadelphia* was decided in which a state-owned landfill presented the market participant question expressly reserved in that opinion. *Philadelphia*, 437 U.S. at 629 n.6.

Moreover, in advancing its "national dimension" proposition, Swin attempts to argue a case other than the one presented to this Court. Swin would attempt to extend the operation by Lycoming County of a single landfill, with rules and regulations pertaining only to that landfill, to activities far afield of the record in this case. The detailed complaint in this case, upon which Swin consciously chose to rest, addresses the operation of one landfill. Any claim that other counties in Pennsylvania or elsewhere will utilize the opinion below to establish facilities that limit the deposit of foreign garbage, see Petition for Writ of Certiorari at 19, is conjecture, not fact or averment.

As the district court noted in its rejection of similar fantasizing contained in Swin's motion to amend the judgment:

> This argument, on its face, goes beyond anything that was plead [*sic*] in this case and beyond anything that the pleadings or the assertions of the Plaintiff indicates [*sic*] could be proved in the course of a trial or in further pretrial factual development. This is the most expansive type of speculation and somewhat

> indicative of the unrealistic approach to what the Plaintiff claims is the factual background of this case. In deciding this matter as we did, we gave to the Plaintiff the benefit of all of the facts alleged and any responsible inferences which could be developed from those facts. Indeed, we considered every argument now proposed by the Plaintiff in this motion for alteration or amendment of judgment. We find the Plaintiff therefore brings to our attention nothing which would cause us to grant the motion.

Appendix to Petition for Writ of Certiorari, 12a-13a.

As Swin suggests, the "tomorrow" referred to in this Court's *Philadelphia* decision has arrived—in fact, it has passed. That tomorrow has shown the feasibility of the market participant doctrine as applied to county-operated landfills, and there is no need for the review that Swin requests.

CONCLUSION

For the reasons stated above, respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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